

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORACLE USA, INC., *et al.*,

Plaintiffs,

vs.

RIMINI STREET, INC., *et al.*,

Defendants.

Case No. 2:10-cv-00106-LRH-PAL

ORDER

(Mot Mod Prot Ord - Dkt. #385, 388)

(Countermot Stay - Dkt. #428)

(Mot Seal - Dkt. #434)

(Mot Leave file Surreply - Dkt. #445)

Before the court is Plaintiffs' Notice of Motion and Motion to Modify Protective Order; Memorandum of Points and Authorities (Dkt. ##385, 388). The court has considered the Motion, Declaration of Kevin Papay and Support of Motion (Dkt. #386), Non-Party CedarCrestone, Inc.'s Opposition (Dkt. #425, 426), and in the Alternative, Countermotion for Stay (Dkt. #428), Plaintiffs' Reply (Dkt. ##430, 432), the Declaration of Geoffrey M. Howard in Support of Plaintiffs' Reply (Dkt. ##431, 433), Plaintiffs' Motion to Seal Plaintiffs' Reply (Dkt. #434), Non-Party CedarCrestone, Inc.'s Reply in Support of Countermotion (Dkt. #444), Non-Party CedarCrestone, Inc.'s Motion for Leave to File Surreply (Dkt. ##445, 447), Declaration of Robert T. Gill in Support of CedarCrestone, Inc.'s Surreply (Dkt. 448), and Plaintiffs' Objection to CedarCrestone, Inc.'s Motion for Leave to File Surreply (Dkt. #449).

BACKGROUND

I. The Complaint.

The Complaint (Dkt. #1) in this action was filed January 25, 2010. An Amended Complaint (Dkt. #36) was filed April 19, 2010. The Amended Complaint seeks damages and injunctive asserting (1) claims for copyright infringement; (2) violation of the Federal Computer Fraud and Abuse Act; (3) violations of the Computer Data Access and Fraud Act; (4) violations of NRS 205.4765; (5) breach of

1 contract; (6) inducing breach of contract; (7) intentional interference with prospective economic
2 advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10)
3 trespass to chattels; (11) unjust enrichment/restitution; (12) unfair practices; and (13) accounting.
4 Oracle alleges that Rimini infringed its intellectual property by copying Oracle's PeopleSoft, J.D.
5 Edwards and Siebel Software application programs. Rimini is alleged to provide cut rate support for its
6 customers using these applications through unlicensed copies of the software in the form of
7 environments and by cross-use—that is, using one of the customer's licensed software to support other
8 customers. Oracle argues that Rimini's use of its software applications infringes its copyrights. Oracle
9 also claims that Rimini has infringed its Oracle Database which provides a foundation for applications.

10 **II. The Dispute.**

11 The parties recognized at the beginning of the case that disclosure and discovery would likely
12 involve production of confidential, proprietary or private information for which special protection from
13 public disclosure and use was required. The parties therefore submitted a Stipulated Protective Order
14 (Dkt. #55) on May 2, 2010, which the court approved and entered as an order. In the current motion,
15 Oracle seeks to modify the Stipulated Protective Order (Dkt. #55) to allow it to use information
16 obtained from non-party CedarCrestone, Inc., ("CedarCrestone") in discovery proceedings in this case
17 in an action filed in the Northern District of California. Oracle previously moved to modify the
18 Stipulated Protective Order to use the same discovery CedarCrestone produced in this case. However,
19 the court denied the motion because there was no pending collateral litigation against CedarCrestone
20 which required modification of the parties' protective order at that time.

21 **A. Oracle's Motion to Modify.**

22 Oracle has now filed a complaint against CedarCrestone in the Northern District of California
23 for copyright infringement, breach of contract and unfair competition, and seeks an order modifying the
24 Protective Order to allow Oracle to use the discovery CedarCrestone produced in this action in the
25 Northern District of California case. Counsel for Oracle represents that the Northern District of
26 California CedarCrestone action was filed based entirely on its investigation and discovery of non-
27 confidential and/or publicly available information. The complaint alleges that CedarCrestone also
28 engaged in unauthorized copying and cross-use of Oracle's PeopleSoft applications to support

1 CedarCrestone's customers, and engaged in the unauthorized distribution of Oracle's tax and regulatory
2 updates, downloaded from Oracle's website, to unlicensed customers. Discovery obtained from
3 CedarCrestone in this action involves the same type of conduct alleged in the Northern District of
4 California action. Oracle therefore seeks limited relief from the protective order entered in this case to
5 allow it to use the discovery CedarCrestone produced in this case in the Northern District of California
6 case. Specifically, Oracle requests that the court modify the stipulated protective order to allow Oracle
7 to use (1) the DVD of computer files produced by CedarCrestone, and (2) the deposition of
8 CedarCrestone's corporate representative, Mr. Paul Simmons, as well as the exhibits used during his
9 deposition.

10 Oracle argues that the Ninth Circuit has a strong policy of favoring access to discovery materials
11 in collateral litigation. The rationale for this policy is that facilitating preparation in other cases
12 advances the interests of judicial economy by avoiding wasteful duplication of discovery. Citing *Foltz*
13 *v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003), Oracle argues the Ninth Circuit
14 has held that requests to modify a protective order to allow use of discovery in collateral litigation
15 "should generally be granted." In *Foltz*, the Ninth Circuit established a two-prong test to determine
16 whether a protective order should be modified. First, the party seeking the modification "must
17 demonstrate the relevance of the protected discovery to the collateral proceedings and its general
18 discoverability therein." *Id.* at 1132. Second, the court weighs "the countervailing reliance interest of
19 the party opposing modification against the policy of avoiding duplicative discovery." *Id.*

20 Oracle contends that both tests are established here. The CedarCrestone discovery obtained in
21 this action is clearly relevant to claims Oracle has made in the collateral litigation pending in the
22 Northern District of California against CedarCrestone. The files on the DVD CedarCrestone produced
23 in this case have information regarding: (1) what tax and regulatory updates CedarCrestone obtained
24 from Oracle and provided to customers; (2) which customers received which updates; (3) whether
25 different customers received identical copies of the same updates; (4) the extent to which
26 CedarCrestone modified the updates before distributing them to customers; and (5) the software
27 environments used to generate the updates. The DVD files and testimony of CedarCrestone's Rule
28 30(b)(6) designee are relevant to Oracle's claim in the CedarCrestone Northern District of California

1 action that CedarCrestone has offered to provide and has provided tax and regulatory update services to
2 customers for PeopleSoft software. It is also relevant to Oracle's claims that CedarCrestone has told
3 prospective customer, Tucson Unified School District, that CedarCrestone's business practice is not to
4 create a new database for each client, but to use one of the customer's licensed software to create copies
5 to support multiple other customers. Finally, the discovery is relevant to Oracle's allegations that
6 CedarCrestone falsely assured prospective customers, such as Tucson Unified School District, that
7 CedarCrestone's status as an Oracle Platinum Partner allows it to provide "all services in a manner that
8 is free of intellectual property infringement."

9 Oracle maintains that CedarCrestone cannot establish that its reliance interests, if any, in the
10 protective order outweigh the efficiencies that would result from a modification of the protective order.
11 This is especially true because the protective order is a blanket protective order. Oracle relies on a line
12 of cases in the Ninth Circuit finding that a blanket protective order results in less reliance because the
13 party designating materials confidential or highly confidential has not made a document-by-document
14 showing that it was entitled to a protective order. Oracle argues that CedarCrestone employed
15 sophisticated counsel who negotiated for modifications to the protective order in this case before
16 agreeing to produce discovery in lieu of responding to Oracle's Motion to Compel. The stipulation
17 Oracle, CedarCrestone and Rimini executed to obtain the discovery did not change the terms of this
18 court's stipulated protective order or make it more restrictive. Paragraph 19 of this Court's Stipulated
19 Protective Order specifically allows for its modification. Finally, even if CedarCrestone has some
20 reliance interest in the secrecy of information it produced in discovery in this case, *Foltz* permits the
21 court to place the same restrictions on use and disclosure contained in this court's Stipulated Protective
22 Order in the collateral litigation. Oracle represents that it is prepared to work cooperatively with
23 CedarCrestone to agree upon an appropriate protective order in the collateral Northern District of
24 California action consistent with the procedures used in that district for entry of stipulated protective
25 orders.

26 **B. CedarCrestone's Opposition.**

27 CedarCrestone filed an opposition to Plaintiff's motion to modify protective order which seeks,
28 in the alternative, a counter motion to stay enforcement of any order modifying the protective order

1 pending reconsideration by the district judge. CedarCrestone claims that Oracle's renewed motion is an
2 attempt to do an "end around" the court's prior ruling denying modification. CedarCrestone maintains
3 that when this court denied Oracle's initial motion to modify the protective order, it properly applied
4 the Ninth Circuit balancing test and weighed CedarCrestone's reliance interest, which included, but was
5 not limited to, the fact that there was no pending collateral litigation in which the discovery was
6 relevant. CedarCrestone claims that Oracle is using the complaint it recently filed in the Northern
7 District of California which alleges breach of contract and copyright infringement relating to three
8 "very finite and specific instances" as a "bootstrap" to improperly seek wholesale lifting of this court's
9 protective order. CedarCrestone contends that the Ninth Circuit has held that modification of a
10 protective order should be denied where a party seeks to exploit the system and subvert the limitations
11 of discovery in collateral proceedings, which it claims is what Oracle is doing here.

12 CedarCrestone disputes that the discovery it produced in this action is relevant to the collateral
13 action. It argues that Oracle itself concedes this by telling the court that it is seeking the materials to
14 obtain leave to amend its Northern District of California complaint. That action relates to breach of
15 contract and copyright infringement allegations involving three customers. However, Oracle is
16 requesting access to a DVD containing 2.16 gigabytes of data produced and a full Rule 30(b)(6)
17 deposition of CedarCrestone without showing the discovery is relevant to Oracle's two claims
18 involving three of CedarCrestone's customers in the collateral action. Thus, Oracle's request is
19 overbroad. Oracle's failure to establish relevancy is particularly problematic because CedarCrestone
20 and Oracle are competitors to some extent and many of the materials at issue contain CedarCrestone's
21 trade secrets. CedarCrestone also argues that the court should deny the motion to modify the protective
22 order because its reliance interest in agreeing to produce the materials in this action was "very
23 significant". CedarCrestone and Oracle entered into an additional negotiated stipulation that
24 incorporates this court's Stipulated Protective Order. CedarCrestone disputes that this is a case
25 involving reliance on a blanket protective order. Rather, the protective order in this case actually states
26 it does not confer blanket protections.

27 CedarCrestone also claims that Oracle violated this court's Stipulated Protective Order after
28 obtaining protected materials it produced in this case by using the protected information outside this

1 case to harm it. Specifically, CedarCrestone asserts that Oracle's general counsel began declining to
2 comply with pre-arranged business obligations to CedarCrestone claiming that CedarCrestone's
3 protected confidential information created a dispute between Oracle and CedarCrestone. In April 2012,
4 Oracle suddenly indicated that it would no longer partner with CedarCrestone in marketing activities,
5 including co-marketing activities that had been planned for months and were in the process of
6 occurring. Oracle informed CedarCrestone that it would no longer provide support for the co-branded
7 Fusion Fast 5 webinar series and would not provide resources for CedarCrestone's demonstration which
8 had been scheduled for many weeks and expected to draw 400 participants. CedarCrestone claims that
9 these actions had a negative impact on CedarCrestone's business operations and development efforts.
10 Several other examples of Oracle actions are cited in the opposition and counter-motion to support
11 CedarCrestone's claim that Oracle violated this court's Stipulated Protective Order by using
12 information it produced in discovery in this case to CedarCrestone's detriment.

13 CedarCrestone argues that the risk of duplicative discovery in the collateral suit is minimal and
14 does not outweigh its own reliance interests in the protective order. Finally, CedarCrestone claims that
15 the motion to modify the protective order is premature because there may not be any discovery in the
16 Northern District of California action if the court dismisses the complaint on CedarCrestone's motion.
17 CedarCrestone has not yet responded to the complaint, but anticipates raising statute of limitation
18 arguments which may result in dismissal of the action.

19 **C. CedarCrestone's Counter-motion to Stay Enforcement.**

20 If the court is not inclined to deny Oracle's motion to modify the protective order,
21 CedarCrestone requests a stay of enforcement of the order modifying the protective order until after the
22 district judge reconsiders the order. CedarCrestone argues that it is likely to succeed on the merits of
23 any appeal, that it will suffer irreparable injury in the absence of a stay, that other parties will not be
24 substantially injured by a stay, and that a stay will not harm any public interests. This is especially true,
25 where, as here, Oracle and CedarCrestone are competitors, and the discovery produced in this action
26 involves trade secrets.

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D. Oracle's Reply.

Oracle replies that CedarCrestone has not denied it engaged in the conduct Oracle asserts constitutes copyright infringement, breach of contract and unfair competition in the collateral Northern District of California action. Nevertheless, CedarCrestone asks that the court deny the motion for protective order. Oracle filed a redacted reply and an unredacted reply under seal to meet its burden of showing why the discovery CedarCrestone produced in this case is relevant to the Northern District of California action. Oracle argues that its complaint in the collateral action provides illustrative examples of CedarCrestone's misconduct and alleges a pattern and practice of misconduct. Oracle disputes that the DVD CedarCrestone produced in discovery in this case contains CedarCrestone's trade secrets. Rather, The DVD contains Oracle's own software code. ("CedarCrestone cannot avoid liability by arguing that Oracle cannot have access to Oracle's software code.") Redacted Reply, Dkt. #430, 1:28 through 2:1. The discovery on the DVD and deposition testimony are relevant to the Northern District of California action because in that case Oracle alleges that CedarCrestone improperly used Oracle's software and made misleading statements to its customers about its practices which constitute copyright infringement, breach of contract, and unfair business practices. Information on the DVD and CedarCrestone's Rule 30(b)(6) deposition testimony support these allegations. The Northern District of California complaint against CedarCrestone outlines conduct with respect to three customers by way of example, but CedarCrestone's wrongdoing is not limited to these three customers. The discovery produced in this case relates to the same type of conduct.

Oracle disputes that its complaint against CedarCrestone is a "sham" complaint to exploit the system and subvert discovery limitations in the collateral proceeding. Oracle initially sought this discovery from CedarCrestone because Rimini defended its own similar conduct by claiming that others in the industry, including CedarCrestone, did the same thing. Oracle disputes that it is seeking wholesale modification of this court's Stipulated Protective Order. Rather, Oracle seeks to modify the protective order with respect to a single six-hour deposition and a single DVD CedarCrestone produced in this case. Oracle reiterates that district courts applying the Ninth Circuit's *Foltz* decision routinely grant modifications to protective orders for much broader and less-defined categories of materials than the two specifically identified items it seeks in this case.

1 Oracle also argues that CedarCrestone has no legitimate reliance interests and will not be
2 prejudiced if the court grants the modification sought. The plain language of the stipulated protective
3 order allows for later modification and specifically provides that a designating or receiving party may
4 seek a determination of the court whether any discovery material should be subject to the terms of this
5 protective order. Counsel for CedarCrestone negotiated a supplemental stipulation which did not alter
6 any party's right to seek modification of the court's Stipulated Protective Order. Where, as here, the
7 express language of the Stipulated Protective Order anticipates a modification, CedarCrestone could not
8 reasonably have relied on a purported assumption that the order would never be modified.

9 Oracle also contends that CedarCrestone was not "induced" to produce discovery pursuant to
10 the Stipulated Protective Order. Oracle claims that CedarCrestone had no valid objections to Oracle's
11 document subpoena. CedarCrestone did not timely object to the subpoena as required by Rule
12 45(c)(2)(B). For whatever reason, CedarCrestone chose not to serve objections and negotiated with
13 Oracle after the deadline for serving objections to the subpoena had passed. Oracle suggests that
14 CedarCrestone negotiated a resolution of its discovery dispute with Oracle to avoid opposing and losing
15 Oracle's motion to compel. Oracle disputes that it ever made assurances to CedarCrestone that it would
16 never seek to use the discovery for any purpose other than the Rimini litigation. Rather, Oracle
17 negotiated a resolution of its discovery dispute with CedarCrestone by pointing out that the Stipulated
18 Protective Order in place in this case provided CedarCrestone with adequate protection.

19 Oracle finds it inconceivable that modification of the protective order that Oracle seeks could
20 tangibly prejudice CedarCrestone's substantial rights. Oracle is not seeking to modify any disclosure
21 provisions to which CedarCrestone has already agreed and itself seeks to preserve the protections
22 against disclosure of trade secrets or other proprietary information. Oracle's requested modification
23 will not put CedarCrestone at a competitive disadvantage because the Stipulated Protective Order
24 prohibits any competitive use of protected discovery material.

25 Oracle also reiterates arguments that the discovery it seeks would otherwise need to be produced
26 in the collateral litigation. It makes no sense to do so where CedarCrestone has already reviewed
27 materials responsive to Oracle's subpoena and produced documents in this case. The fact that the
28 discovery may also form a basis to amend Oracle's existing claims does not mean the evidence is not

1 currently discoverable. Parties routinely amend their complaints based on information learned through
2 discovery, precisely because discovery can and does support multiple claims. Oracle also disputes that
3 modifying the protective order is premature at this time. Oracle believes that it will defeat any motion
4 asserting a statute of limitations defense. However, even if some of Oracle's claims are held time
5 barred, the statute of limitation for copyright infringement is three years and the discovery Oracle seeks
6 is relevant to its infringement claim.

7 Oracle affirmatively represents that it has not violated the court's Stipulated Protective Order.
8 Oracle claims that when it concluded that CedarCrestone had infringed, and was continuing to infringe
9 its intellectual property Oracle sought to negotiate a resolution of the dispute with CedarCrestone.
10 Oracle claims that CedarCrestone's statements and admissions in negotiating a resolution to the
11 subpoena and motion to compel would alone justify Oracle's lawsuit and its refusal to continue joint
12 marketing activities with CedarCrestone. CedarCrestone's own conduct caused Oracle to conclude that
13 CedarCrestone was not acting like a true partner and had not complied with its partnership agreement.

14 **E. Oracle's Opposition to Countermotion.**

15 Finally, Oracle asks that the court deny CedarCrestone's alternative motion for stay.
16 CedarCrestone has not shown likelihood of success on the merits on appeal, or that it would suffer
17 irreparable injury in the absence of the stay, or that the parties will not be substantially injured by the
18 stay, or that the stay will not harm the public interests. Oracle cites a number of cases for the
19 proposition that stays of magistrate judge discovery orders should be granted sparingly.

20 **F. CedarCrestone's Motion for Leave to File Surreply.**

21 CedarCrestone asks for leave to file a surreply asserting that Oracle raised two arguments in its
22 reply brief for the first time. Therefore, the court should either disregard new material contained in
23 Oracle's reply brief or allow CedarCrestone a reasonable opportunity to respond by surreply.
24 Cedarcrestone maintains that Oracle's reply now admits it was already investigating CedarCrestone's
25 business practices when it subpoenaed CedarCrestone's confidential information in this case. Oracle
26 did not disclose this to CedarCrestone when it sought the documents and therefore intentionally induced
27 CedarCrestone's reliance. Second, CedarCrestone claims that Oracle's reply now admits that when the
28 court initially denied Oracle's request to modify the protective order Oracle sought out any conduct it

could find to create a collateral suit. CedarCrestone argues that this is the type of discovery exploitation that warrants denial of a motion to modify the protective order. Additionally, CedarCrestone vehemently denies it engaged in any conduct that constitutes copyright infringement or that it is attempting to use the protective order as a shield from liability. Rather, Oracle is trying to use the protective order as a sword after inducing CedarCrestone, its partner, to produce documents and witnesses solely for the Rimini action which Oracle intended to use against it elsewhere. Finally, CedarCrestone argues that Oracle's arguments in its reply brief that there is no prejudice to CedarCrestone because Oracle already has the information it seeks is a reason to deny modification of the protective order.

G. Oracle's Objection to CedarCrestone's Motion for Leave to File Surreply.

Succinctly put, Oracle disputes that its reply raised any new issues that warrant a surreply. However, if the court grants leave to file the surreply, Oracle has more to say.

DISCUSSION

I. Oracle's Motion to Modify Protective Order

The parties in this action filed a proposed Stipulated Protective Order Governing Confidentiality of Documents (Dkt. #53) on May 20, 2010, which the court approved and entered as a Stipulated Protective Order (Dkt. #55) on May 21, 2010. The stipulation between Oracle and Rimini acknowledged that discovery in this action was likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and use for any purpose other than prosecuting this action would be warranted. They stipulated to a protective order acknowledging that it would not confer blanket protection on all disclosures or responses to discovery and that the protection it afforded would extend only to limited information or items entitled to be treated as confidential under applicable legal principles.

The protective order the court approved in this case allows a disclosing party to designate discovery as "Confidential Information", or "Highly Confidential-Attorneys' Eyes Only". Protective Order (Dkt. #55) ¶1. It also provides an opportunity for any non-party to designate material as "Confidential Information" or "Highly Confidential-Attorneys' Eyes Only" pursuant to the terms of this protective order, upon execution of a declaration of compliance in substantially the same form as that

1 attached as Exhibit “A” to the protective order. *Id.* ¶2. Any party designating discovery material as
2 “Confidential Information” or “Highly Confidential Information” represents that an attorney for the
3 designating party reasonably believes there is a valid basis for the designation. *Id.* “Confidential
4 Information” is defined in paragraph 3, and “Highly Confidential Information” is defined in paragraph
5 4. The protective order prevents disclosure of any confidential or highly confidential information from
6 being disclosed except as permitted by the order. *Id.* ¶5.

7 This court’s protective order precludes a receiving party from disclosing confidential or highly
8 confidential information to persons other than those identified in the protective order. *Id.* ¶8. It also
9 prohibits a receiving party from using confidential or highly confidential discovery materials for any
10 purpose other than preparation for trial and/or appeal of this case, and for any business or commercial
11 purpose. *Id.*

12 The stipulated protective order contains a provision that a receiving party does not waive its
13 right to challenge a confidentiality designation by not promptly challenging a designation unless a
14 prompt challenge is necessary to avoid foreseeable substantial unfairness, unnecessary economic
15 burdens, or a later significant disruption or delay of the litigation. *Id.* ¶16. It contains a detailed
16 procedural mechanism for challenges to a confidentiality designation requiring, inter alia, that the
17 designating party bear the burden of proof in any challenge to a designation. *Id.* The protective order
18 specifically provides that entering into the protective order shall not constitute an admission by any
19 designating or receiving party that any particular document, material, testimony, or thing does or does
20 not constitute a trade secret or other confidential or highly confidential information. *Id.* ¶17. The
21 protective order allows either party to seek modification, or relief from it by applying to the court with
22 notice to other parties. *Id.* ¶19.

23 The court approved the parties’ blanket protective order to facilitate the parties’ discovery
24 exchanges. The parties did not show, and the court did not find, that any specific documents were
25 secret, confidential, proprietary, or otherwise entitled to protection from public disclosure under any
26 applicable state or federal legal principles. The parties did not provide specific facts supported by
27 affidavits or concrete examples to establish that a protective order was required to protect any trade
28 secret or other confidential information pursuant to Rule 26(c) or that the disclosure would cause an

1 identifiable and significant harm. The stipulated protective order merely allows a party or non-party
2 producing or disclosing documents to designate discovery materials as confidential or highly
3 confidential without court intervention. The stipulated protective order is a blanket protective order in
4 this sense.

5 CedarCrestone argues that the court's stipulated protective order in this case specifically states it
6 does not confer blanket protection. This is true. The parties did not seek, and the court did not allow,
7 the parties to confer blanket protection on *all* discovery materials produced in this case. Rather, the
8 stipulated protective order allows the parties and non-parties producing discovery in this case to
9 designate materials as confidential or highly confidential only if counsel for the designating party
10 reasonably believes there is a valid basis for doing so. The protective order defines "Confidential
11 Information" to include non-public information or matter related to: financial or business plans or
12 projections; acquisition offers or expressions of interest; proposed strategic transactions or other
13 business combinations; compensation plans; proprietary technical information and specifications;
14 current or future business and marketing information, plans and strategies; studies or analyses by
15 internal or outside experts; customer information, data or lists; confidential financial data or results; tax
16 data; confidential information regarding assets and liabilities; valuation analyses; competitive analyses;
17 confidential personnel information; personal financial information; personal information subject to
18 protection under California or Nevada law; or other commercially or personally sensitive or proprietary
19 information. Protective Order (Dkt. #55) ¶3. Confidential information does not include information or
20 documents produced or disclosed that are a matter of public record or publicly available by law or
21 otherwise. *Id.*

22 "Highly Confidential Information" is defined as only extremely sensitive, highly-confidential,
23 non-public information, consisting either of trade secrets or other highly confidential documents related
24 to current or future business plans, protocols, or strategies, the disclosure of which would likely cause
25 competitive or business injury to the designating party. *Id.* ¶4. The protective order allows highly
26 confidential information to be designated for attorneys' eyes only. *Id.*

27 In short, the stipulated protective order did not allow counsel to maintain the confidentiality of
28 all documents and materials produced in discovery which are presumptively public in the Ninth Circuit.

1 Rather, it allowed counsel to designate specifically described categories of documents as confidential or
2 highly confidential without making the required showing that a Rule 26(c) motion for protective order
3 mandates. These types of stipulated protective orders are now routine in federal discovery practice and
4 facilitate the parties' exchanges without expensive and time consuming motion practice.

5 In the Ninth Circuit it is well established that under the Federal Rules of Civil Procedure, in the
6 absence of a court order to the contrary, materials produced in discovery are presumptively public. *San*
7 *Jose Mercury News, Inc. v. United States District Court-Northern District*, 187 F.3d 1096, 1103 (9th Cir.
8 1999); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). Rule 26(c) gives the court
9 authority to override the presumption of public access for good cause shown on a motion for protective
10 order. *San Jose Mercury News, Inc.*, 187 F.3d at 1103. A court issuing a protective order has the authority
11 to modify or lift protective orders that it has entered. *Empire Blue Cross & Blue Shield v. Janet Greeson's*
12 *A Place For Us, Inc.*, 62 F.3d 1217, 1219, (9th Cir. 1995).

13 When a party or non-party producing or disclosing materials in discovery has not met its burden
14 under Rule 26(c) that the discovery materials are entitled to protection from disclosure, a stipulated
15 protective order is inherently subject to challenge and modification. *San Jose Mercury News, Inc.*, 187 F.3d
16 at 1103; *Beckman Indus., Inc.*, 966 F.2d at 476. In the Ninth Circuit it is well established that a party or
17 non-party who has never made a showing of good cause justifying entry of a protective order under Rule
18 26(c) may not rely solely on a stipulated protective order to "justify refusal when there is a reasonable
19 request for disclosure." *Beckman Indus., Inc.*, 966 F.2d at 476; *Olympic Refining Co. v. Carter*, 332 F.2d,
20 260, 264-66 (9th Cir.) (*cert denied*) 379, U.S. 900, 85 S. Ct. 186, 13 L. Ed. 2d 175 (1964).

21 Here, Oracle seeks to modify the stipulated protective order entered by this court to use discovery
22 materials it obtained from non-party CedarCrestone in this case in collateral litigation in the Northern
23 District of California. In *Foltz v. State Farm Mut. Auto Insurance Co.*, 331 F.3d 1122 (9th Cir. 2003), the
24 Ninth Circuit addressed the standards district courts must apply in deciding a request by a collateral litigant
25 to modify a protective order permitting access to materials produced subject to a protective order. *Foltz*
26 began by citing *Beckman* for the proposition that the Ninth Circuit strongly favors access to discovery
27 materials to meet the needs of parties engaged in collateral litigation. *Foltz*, 331 F.3d at 1131. Allowing
28 use of discovery materials in "one litigation to facilitate preparation in other cases advances the interests

1 of judicial economy by avoiding the wasteful duplication of discovery.” *Id.* The Ninth Circuit held that
2 a court issuing a protective order should generally grant a request to modify a protective order to allow
3 collateral litigants to obtain relevant material, provided reasonable restrictions on collateral disclosure will
4 continue to protect an affected party’s legitimate interest in privacy. *Id.* at 1132.

5 However, a collateral litigant’s request for modification of a protective order should not be
6 automatically granted. *Id.* A collateral litigant must demonstrate the relevance and general discoverability
7 of the protected discovery to the collateral proceedings. *Id.* Requiring this showing prevents collateral
8 litigants from gaining access to discovery materials merely to subvert limitations on discovery in another
9 proceeding. *Id.* A determination of relevance depends on the degree of overlap in facts, parties, and issues
10 between the suit covered by the protective order and the collateral proceeding. *Id.* (internal citations and
11 quotations omitted.)

12 The court issuing the protective order should satisfy itself that the protected discovery is
13 significantly relevant to the collateral litigation such that a substantial amount of duplicative discovery will
14 be avoided by modifying the protective order. *Id.* However, the court issuing the protective order must
15 leave the specific questions of the discoverability in the collateral litigation to the court in the collateral
16 litigation. *Id.* The collateral litigant is not required to obtain a relevance determination from the court
17 overseeing the collateral litigation prior to requesting modification of a protective order from the court that
18 issued it. *Id.* This is because the court that issued the protective order is in the best position to make the
19 relevance assessment as it is presumably familiar with the contents of the protected discovery. *Id.*

20 However, the court issuing the protective order makes only a rough estimate of relevance in
21 determining whether the protective order should be modified to allow its use in collateral litigation. The
22 court modifying a protective order “does not decide whether the collateral litigants will ultimately obtain
23 the discovery materials.” *Id.* at 1133. Rather, the court modifying a protective order that it has issued
24 “must refrain from embroiling itself in the specific discovery disputes applicable only to the collateral suit.”
25 *Id.* The court responsible for issuing the protective order decides whether modifying the protective order
26 will eliminate the potential for duplicative discovery. *Id.* If the protective order is modified, the collateral
27 court controls the discovery process and decides disputes over the ultimate discoverability of the specific
28 materials covered by the protective order. *Id.*

1 Before deciding to modify a protective order, the court that issued it must also weigh the
2 countervailing reliance interests of the party opposing modification against the policy of avoiding
3 duplicative discovery. *Id.* A blanket protective order is, by its nature, overinclusive. *Id.* Reliance on a
4 blanket protective order will not justify a refusal to modify. *Id.* A legitimate interest in preventing public
5 disclosure of materials produced in discovery pursuant to a protective order can be accommodated by
6 placing the collateral litigant under the same restrictions on use and disclosure contained in the original
7 protective order. *Id.*

8 Applying these principles, the court finds that Oracle has met its burden of showing that the
9 discovery produced by CedarCrestone in this case pursuant to this court's protective order is relevant and
10 generally discoverable in the collateral Northern District of California case. In this case, Oracle alleges that
11 Rimini provides cut-rate support for its customers using Oracle software applications through unlicensed
12 copies of the software and by using licensed customers' software to support other customers. Oracle alleges
13 that Rimini's use of its software applications infringes its copyrights and asserts various other claims arising
14 out of these allegations. Oracle sought and ultimately obtained discovery from CedarCrestone in this case
15 because Rimini has defended this action claiming that others in the industry, including CedarCrestone, do
16 exactly the same thing that Rimini does in supporting its customers using Oracle's software applications.

17 Oracle has now sued CedarCrestone in the Northern District of California action claiming that
18 CedarCrestone has engaged in unauthorized copying and cross use of Oracle's proprietary and copyright
19 protected software applications to support CedarCrestone's customers. Oracle also alleges CedarCrestone
20 engaged in unauthorized distribution of its tax and regulatory software updates to support unlicensed
21 customers. Additionally, Oracle alleges that CedarCrestone has made false and misleading statements to
22 prospective customers, such as Tucson Unified School District, that what CedarCrestone does does not
23 infringe Oracle's intellectual property because of CedarCrestone's status as an Oracle Platinum Partner.
24 In this case. Oracle also alleges that Rimini has made false and misleading statements to its customers that
25 its use of Oracle's software applications does not infringe Oracle's intellectual property.

26 The discovery CedarCrestone produced in this case involves what CedarCrestone does with Oracle's
27 software. It is relevant in the Northern District of California case for the same reason that it is relevant and
28 discoverable within the meaning of Rule 26(b)(1) in this case. The merits of what Rimini and

1 CedarCrestone actually do with Oracle's software and whether what they do infringes or constitutes any
2 other actionable claim is, of course, not for this court to determine in the context of a discovery dispute.

3 The court also finds that modifying the protective order issued in this case will advance the interests
4 of judicial economy by avoiding wasteful duplication of discovery in the Northern District of California
5 action. Significant time and resources were devoted to reviewing the discovery for production, reviewing
6 the discovery after production, and preparing for and taking deposition testimony of CedarCrestone's Rule
7 30(b)(6) designee. The discovery was conducted to establish what CedarCrestone does with Oracle's
8 software applications and what representations it makes about what it does to its customers. This court
9 does not presume to decide whether the assigned judge in the Northern District of California should
10 ultimately allow Oracle to use the discovery CedarCrestone produced in this case in the Northern District
11 of California action. It is for the court in the Northern District of California to determine the relevance and
12 discoverability of the discovery CedarCrestone produced in this case to the case pending before it.

13 Finally, the court must weigh CedarCrestone's reliance interests against the policy of avoiding
14 duplicative discovery. The protective order that was issued in this case does not confer blanket protection
15 over all discovery materials produced in discovery in this case. It is, however, a blanket protective order
16 in that a party or non-party designating materials as confidential or highly confidential was not required to
17 make the good-cause showing required by Rule 26(c) with respect to any particular document.
18 Additionally, the stipulated protective order issued in this case plainly and clearly allows a receiving party
19 to challenge a designation. It also allows any party or non-party to seek modification of the protective
20 order. Thus, the court finds that CedarCrestone's reliance interest on a blanket protective order allowing
21 designation of documents as confidential and highly confidential without a required good-cause showing
22 does not justify denying the motion to modify.

23 The court will therefore grant Oracle's motion to modify the protective order for the limited purpose
24 of allowing the DVD produced in discovery and the deposition testimony of CedarCrestone's Rule 30(b)(6)
25 designee to be used in the Northern District of California action. These discovery materials shall remain
26 subject to the court's stipulated protective order for all other purposes. Specifically, as this court's
27 protective order provides, these discovery materials may not be used for any business or commercial
28 purpose. Additionally, the court will direct that Oracle meet and confer with counsel for CedarCrestone

1 in a good-faith effort to agree upon an appropriate protective order in the Northern District of California
2 action consistent with the procedures used in that district for entry of a stipulated protective order.

3 **II. CedarCrestone's Countermotion for Stay.**

4 CedarCrestone's countermotion asks that this court stay enforcement of any order modifying the
5 protective order until after the district judge reconsiders the order. The countermotion is denied.
6 Magistrate judges in this district are authorized to exercise all powers and duties conferred or imposed upon
7 magistrate judges by 28 U.S.C. § 636(a). LR IB 1-1(a). Magistrate judges in this district exercise general
8 supervision of civil calendars and are automatically referred all matters involving routine case management
9 and discovery disputes. Review and appeal of a pretrial discovery order is governed by 28 U.S.C. §
10 636(b)(1)(A) and LR IB 3-1 and requires a showing that the magistrate judge's ruling is clearly erroneous
11 or contrary to law. The decision to modify a protective order this court entered is a discretionary decision.
12 CedarCrestone is unlikely to succeed on the merits given the discretionary nature of the decision and the
13 clearly erroneous and contrary to law standard of review. Additionally, CedarCrestone has not established
14 that it will suffer irreparable injury in the absence of a stay because the court has ordered that the discovery
15 materials at issue shall remain subject to the court's stipulated protective order for all other purposes and
16 specifically, that these discovery materials shall not be used for any business or commercial purposes.

17 **III. CedarCrestone's Motion for Leave to File Surreply.**

18 The court is not satisfied that a surreply was required because of any new matters Oracle raised for
19 the first time in its reply brief. It triggered another Oracle response and caused further delayed
20 consideration of the motion and countermotion. However, the court took the time and effort to carefully
21 review it. To avoid any potential dispute about whether Oracle's reply raised new matters that deprived
22 CedarCrestone of an opportunity to respond, the motion will be granted.

23 For the reasons stated,

24 **IT IS ORDERED** that:

- 25 1. Oracle's Motion to Modify the Protective Order (Dkt. ##385, 388) is **GRANTED**.
- 26 2. CedarCrestone's Countermotion to Stay (Dkt. #428) is **DENIED**.

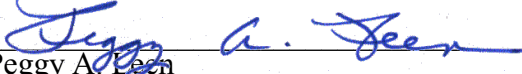
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3. Oracle's Motion to Seal Reply (Dkt. #434) is **GRANTED**.

4. CedarCrestone's Motion for Leave to File Surreply (Dkt. #445) is **GRANTED**.

Dated this 6th day of December, 2012.


Peggy A. Leen
United States Magistrate Judge